No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASIPUBLIC CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE NO. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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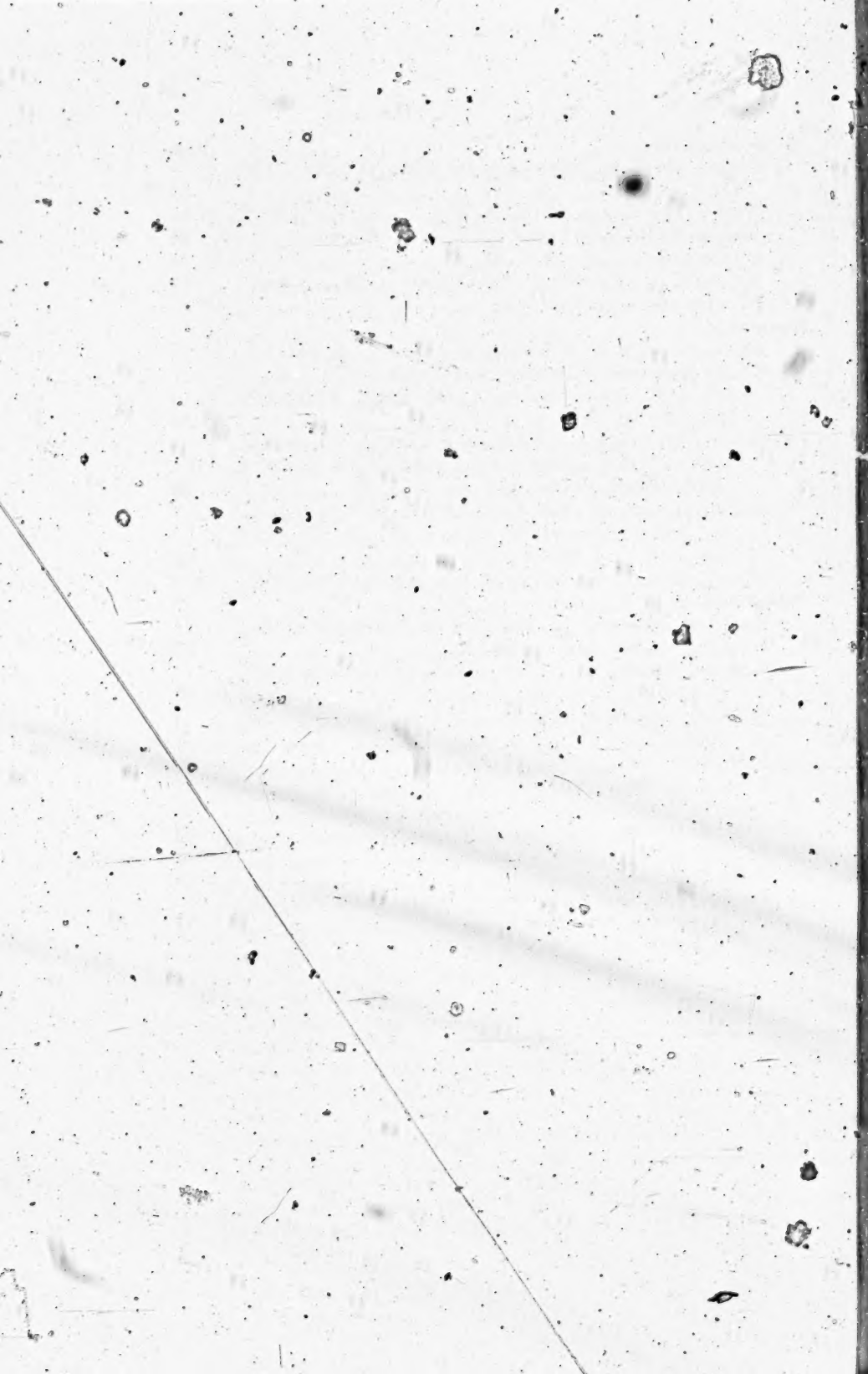

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 48–62) is reported in 100 F. (2d) 929.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1938 (R. 63). A petition for rehearing, filed January 9, 1939, was denied January 23, 1939 (R. 63, 65). The petition for a

writ of certiorari was filed on March 3, 1939, and was granted on April 17, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner illegally collected taxes on land of a restricted Indian allottee which was exempt from all taxation by virtue of Acts of Congress and treaties between the United States and the Indians. The United States recovered for the allottee the amounts collected as taxes, together with interest from the dates of payment. The questions are:

1. Whether the United States suing as guardian for the Indian allottee is entitled to interest on the money involuntarily paid as taxes during the period such money was wrongfully retained by the county.

2. Whether the decisions or statutes of Kansas limit or defeat the right to such interest.

TREATIES AND STATUTES INVOLVED

The applicable provisions of the treaties and statutes involved will be found in the Appendix, *infra*, pp. 36–39.

STATEMENT

In 1893 a trust patent covering certain farm land situated within the State of Kansas was issued to M-Ko-Quah-Wah, an incompetent, full-blood Pottawatomie Indian (R. 19–21, 28). Pursuant to the terms of the General Allotment Act of 1887 and in

fulfilment of an obligation of the Treaty of 1861 (*infra*, pp. 36–38), the United States in the patent agreed to hold the land in trust for this allottee or her heirs for twenty-five years or, in the discretion of the President, for an extended period, and at the end of such trust period to convey to her the land in fee "discharged of said trust and free of all charge or incumbrance whatsoever" (R. 20). The trust period was extended for twenty years by executive orders dated July 30, 1918, and April 16, 1928 (R. 21), and was extended indefinitely by Act of Congress, June 18, 1934, c. 576, Sec. 2, 48 Stat. 984.

In 1918, over the objection of the allottee, a fee simple patent was substituted for the trust patent (R. 22, 23–24, 25). The allottee's land was placed on the county tax rolls in the spring of 1919 (R. 35), and taxes (including several penalties) were collected for the years 1919–1933 (R. 8). In 1927 Congress passed an Act (44 Stat. 1247) authorizing the Secretary of the Interior to cancel fee simple patents issued without the consent of the allottee before the expiration of the trust period (R. 25). Pursuant to the terms of this Act, the fee simple patent issued to M-Ko-Quah-Wah was cancelled in 1935 (R. 25–26).

On December 23, 1936, the United States as guardian of the allottee instituted this action in the United States District Court for the District of Kansas to recover the sums paid in taxes, totaling $1,966.13, and interest thereon from the respective

dates of payment (R. 1–5, 26). The case was submitted to a jury with instructions to allow interest at 6% upon all sums paid involuntarily to the county by the allottee (R. 41–42). The jury returned a verdict in favor of the Government for principal and interest in the sum of $3,277.49 (R. 47). A judgment entered in accordance with the verdict was affirmed in all particulars by the Circuit Court of Appeals (R. 63).

The petition for a writ of certiorari to this Court does not challenge the right of the United States to recover taxes paid with interest from the date of judgment (Pet. 3, 6, 9). The sole contention of the petitioner is that the court erred in awarding interest from the dates the taxes were illegally collected to the date of the judgment (Br. 9).

SUMMARY OF ARGUMENT

I

The tax exemption asserted on behalf of the Indian allottee was conferred by Congress in pursuance of a treaty obligation and in the exercise of its plenary power over the Indians. Accordingly, the exemption is a federal right and its scope is determined by federal law. *Carpenter* v. *Shaw*, 280 U. S. 363, 367; *United States* v. *Rickert*, 188 U. S. 432.

A broad construction of the tax exemption in favor of the allottee should be given under the liberal rules of construction applicable to Indian grants. *United States* v. *Shoshone Tribe*, 304 U. S. 111,

116; *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367. The Indian under such a liberal construction is entitled to an outright exemption from enforced contributions for the maintenance of local governments. *Choate* v. *Trapp*, 224 U. S. 665; cf. *United States* v. *Osage County*, 251 U. S. 128, 133. This clearly precludes the existence of any right in terms to demand from the allottee the uncompensated use of her money or property for the support of the county.

Implicit in the exemption is the right of the allottee to obtain restitution in the event it is violated and the right to be restored to the position she would have occupied had the exemption been respected. *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. The claim of the allottee for interest is merely an assertion of the right to be made whole for the enforced use of her money in violation of the exemption.

The federal courts clearly recognize that full restitution requires the payment of interest for money wrongfully detained. *Billings* v. *United States*, 232 U. S. 261, 284–288. The doctrine that interest does not run against the sovereign has no bearing upon the scope of the exemption from local taxes conferred by Congress upon the allottee. This Court has, without discussion, affirmed or reinstated judgments which allowed interest against a county on taxes wrongfully collected from Indian allottees. *Ward* v. *Love County*, 253 U. S. 17; *McCurdy* v. *United States*, 264 U. S. 484.

Since there are no special circumstances to limit the scope of the exemption here, this Court should construe the exemption to include interest. To hold otherwise would be to ignore the liberal rules of construction applicable to Indian grants and to permit a disguised tax in the form of the enforced use of the money of the allottee.

II

The Kansas courts have not determined that an Indian allottee is not entitled to interest on taxes wrongfully collected by a county. Accordingly, the federal courts in the exercise of a sound discretion may apply established federal principles where interest is claimed. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 551.

The state law, if contrary, must yield to the superior federal rule. It is settled beyond controversy that the power of Congress over the Indians in Kansas is plenary. *The Kansas Indians*, 5 Wall. 737, 755–756; *Sage* v. *Hampe*, 235 U. S. 99, 106. This Court in a number of cases has declared inapplicable state laws or decisions which abridged rights conferred by Congress upon the Indians. *United States* v. *Rickert*, 188 U. S. 432; *Bunch* v. *Cole*, 263 U. S. 250; *Carpenter* v. *Shaw*, 280 U. S. 363. The conflict need not be direct or immediate; a possible interference with the policy of the federal law may render the state doctrine inapplicable. *Sage* v. *Hampe*, 235 U. S. 99; cf. *Tullock* v. *Mulvane*, 184 U. S. 497. A suit by the United States

on behalf of its Indian wards cannot be defeated by either substantive or procedural rules of state law. *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *Davis* v. *Wechsler*, 263 U. S. 22, 24. Neither fiscal arrangements nor local doctrines of estoppel bind the United States suing on behalf of its ward. *Cramer* v. *United States*, 261 U. S. 219, 234, *Ward* v. *Love County*, 253 U. S. 17, 24. There can be no reliance upon immunity to suit. *United States* v. *Minnesota*, 270 U. S. 181; *Chicot County* v. *Sherwood*, 148 U. S. 529.

The doctrine asserted by the petitioner is opposed to the established federal rule and would constitute a substantial encroachment upon the right of the allottee to complete tax exemption.

ARGUMENT

I

THE INDIAN ALLOTTEE HAS A FEDERAL RIGHT TO TAX EXEMPTION AND TO INTEREST ON TAXES WRONGFULLY COLLECTED

A. THE EXEMPTION IS A FEDERAL RIGHT, AND ITS SCOPE IS DETERMINED BY FEDERAL LAW

The Treaty with the Pottawatomies of November 15, 1861,[1] directed the Commissioner of Indian Affairs to assign in severalty to members of that tribe certain tracts of land which were to be "exempt from levy, taxation, or sale." The trust patents issued in fulfillment of that treaty and pur-

[1] 12 Stat. 1191 (Art. 2), as supplemented by the Treaty of March 29, 1866, 14 Stat. 763.

suant to the General Allotment Act of 1887[2] bound the United States to convey the land "free of all charge or incumbrance whatever" at the end of the trust period. Such patents have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation affecting the land. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665, 673; *United States* v. *Rickert*, 188 U. S. 432, 437; *The Kansas Indians*, 5 Wall. 737, 757.[3] The provision for the exemption confers upon the allottees property rights which are within the protection of the Fifth Amendment and hence are not subject to repeal by later Congressional legislation (*Choate* v. *Trapp*, 224 U. S. 665) and the restriction, being one imposed in the exercise of the plenary power of Congress over the tribal lands and in the performance of its duty as guardian of its In-

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[2] 24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182; Act of February 26, 1927, c. 215, 44 Stat. 1247; Act of February 21, 1931, c. 271, 46 Stat. 1205; and Wheeler-Howard Act of June 18, 1934, c. 576, 48 Stat. 984.

[3] See also *Board of Comm'rs of Tulsa County, Okla.* v. *United States*, 94 F. (2d) 450 (C. C. A. 10th); *United States* v. *Benewah County*, 290 Fed. 628 (C. C. A. 9th); *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232 (C. C. A. 9th); *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8th); *United States* v. *Board of County Comm'rs*, 13 F. Supp. 641 (N. D. Okla.); *United States* v. *Dewey County, S. D.*, 14 F. (2d) 784 (S. D.); aff'd *sub nom. Dewey County, S. D.* v. *United States*, 26 F. (2d) 434 (C. C. A. 8th), certiorari denied, 278 U. S. 649; *United States* v. *Board of Comm'rs*, 6 F. Supp. 401 (W. D. Okla.); *United States* v. *Chehalis County*, 217 Fed. 281 (W. D. Wash.).

dian wards,[4] is a limitation upon the taxing power of the state. *Carpenter* v. *Shaw,* 280 U. S. 363; *The Kansas Indians,* 5 Wall. 737.

The allotment upon which the taxes were levied here concededly was exempt from taxation during the years 1919 to 1933.[5] The scope of the protection afforded by similar exemptions has been delineated on several occasions by this Court. These decisions establish a settled rule that the scope of the right thus given by Congress must be determined by federal law. See *Carpenter* v. *Shaw,* 280 U. S. 363, 367; *United States* v. *Rickert,* 188 U. S. 432, 442–443. No matter in what form the problem arises, it is a federal question whether a federal right has been encroached upon either directly or in substance and effect. *Ward* v. *Love County,* 253 U. S. 17, 22. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The principle is general and necessary." *Davis* v. *Wechsler,* 263 U. S. 22, 24.

B. THE EXEMPTION INCLUDES INTEREST AS PART OF RESTITUTION OF TAXES WRONGFULLY COLLECTED

1. Indian rights and exemptions are broadly construed

The scope of the exemption conferred by Congress on the allottee should not be fixed with a

[4] See *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565.

[5] Petition for certiorari, pp. 3, 6, 9. See cases cited in note 3, *supra.*

grudging hand. "While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, * * * the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. * * * Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S. 363, 366. The sound reasons impelling this liberal rule of construction for Indian rights have been explained in numerous decisions of this Court. See *Worcester* v. *Georgia*, 6 Pet. 515, 582; *The Kansas Indians*, 5 Wall. 737, 760; *Jones* v. *Meehan*, 175 U. S. 1, 10–11; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 402; *United States* v. *Celestine*, 215 U. S. 278, 290; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. The principles laid down in these cases, which hold the United States as trustee to an exacting standard of fair dealing with its wards, require an equally careful safeguarding of their rights from infringement by others less concerned with their welfare.*

2. The allottee is entitled to full restitution

The present use of money is itself a thing of value, and, if the allottee could in terms be forced

* Cf. *United States* v. *Kagama*, 118 U. S. 375, 384.

to contribute it to the local government, the value of her exemption would be materially lessened. See *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.). The immunity which the Indians understood was being granted (*Jones* v. *Meehan*, 175 U. S. 1, 11) would thus seem to forbid an enforced use, just as surely as an outright taking, by taxation, of her money. The inclusive character of the exemption is shown by *Choate* v. *Trapp*, 224 U. S. 665, and *United States* v. *Rickert*, 188 U. S. 432, where the collection of taxes wrongfully levied upon restricted Indians was enjoined. Similar relief might be given notwithstanding the requirement of a state that her citizens pay first and litigate later. Cf. *United States* v. *Osage County*, 251 U. S. 128, 133. The decisions of this Court which have stricken down other attempts to encroach upon the tax exemption conferred by Congress also impel a denial of the right of a county to require in terms from a restricted allottee a contribution in the form of the use of his money or property. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Rickert*, 188 U. S. 432, 437.

Congress has made no express provision for restitution in the event the right of its ward to tax exemption is violated. Nevertheless, this Court has directed the restitution of taxes illegally collected under compulsion. *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17.

Since the state law in both of these cases forbade recovery, the decisions stand for the proposition that the right to restitution under such circumstances is implicit in the federal right to tax exemption. Restitution is incomplete unless compensation is given, by way of interest, for the deprivation of the use of the money illegally collected. The infringement in the case of a forced *use* of the allottee's money without restitution is comparable to that in the case of a forced *collection* of her money without restitution. The fact that the restitution sought for the forced use of the money of the allottee is called "interest" does not alter the nature of the claim. The allottee is seeking to be restored to the position she would have occupied had her exemption not been violated. To refuse to make the allottee whole would be to ignore the liberal rule of construction rightfully invoked in favor of the Indian and to narrow unduly the exemption granted by the United States.

3. Interest is generally a part of full restitution

The federal courts clearly recognize that full restitution requires the payment of interest for the wrongful detention of money or property. *Young* v. *Godbe*, 15 Wall. 562, 565; *National Home* v. *Parrish*, 229 U. S. 494; *Billings* v. *United States*, 232 U. S. 261, 284–285; *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79; *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545; *United States* v. *Creek*

Nation, 295 U. S. 103; *Ticonic Bank* v. *Sprague*, 303 U. S. 406, 410.[7] The currently accepted views were well summed up by Judge Learned Hand:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.[8]

The myriad decisions dealing with interest show that the right to recover taxes wrongfully withheld differs in no essential feature from the right to recover other sums. This Court as a matter of general principle, without authority of statute, has established the right of the Government to collect interest on delinquent taxes. *Billings* v. *United States*, 232 U. S. 261, 284–288. Nor is this right to interest confined to the United States, for all litigants may recover interest on taxes wrongfully collected so long as the suit in form is not against the United States. *Billings* v. *United States*,

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[7] See also *Railroad Credit Corp.* v. *Hawkins*, 80 F. (2d) 818, 826 (C. C. A. 4th), certiorari denied, 298 U. S. 667; *Wabash Ry. Co.* v. *Koenig*, 274 Fed. 909, 912 (C. C. A. 8th), certiorari denied, 257 U. S. 660.

[8] *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.); see also *Nutt* v. *Ellerbe*, 56 F. (2d) 1058 (E. D. S. C.).

supra; *Redfield* v. *Bartels*, 139 U. S. 694; *Erskine* v. *Van Arsdale*, 15 Wall. 75, 77.[9]

The right of the taxpayer to interest, as an essential element of full restitution, is illustrated by the cases holding the remedy at law to be inadequate and granting equitable relief in cases where the state has not provided for interest on taxes legally refundable. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386 n.; *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165 (S. D. N. Y.); cf. *California* v. *Latimer*, 305 U. S. 255, 261.

The decisions dealing with moratoria statutes likewise have emphasized the need to provide for payment of the debt in full *with interest* as a necessary requirement of validity. *Louisville Bank* v. *Radford*, 295 U. S. 555, 575, 579, 581, 591, 592; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 61; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 445. Similarly, the payment of interest as a part of just compensation has been held to be a constitutional requirement in eminent domain proceedings. *Jacobs* v. *United States*, 290 U. S. 13, 17; cf. *United States* v. *Creek Nation*, 295 U. S. 103.[10]

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[9] See also *National Home* v. *Parrish*, 229 U. S. 494, 496; *Haiku Sugar Co.* v. *Johnstone*, 249 Fed. 108, 109 (C. C. A. 9th); *New York Mail & Newspaper Transp. Co.* v. *Anderson*, 234 Fed. 590, 595 (C. C. A. 2d); *Herold* v. *Shanley*, 146 Fed. 20, 24 (C. C. A. 3d); *Pennsylvania Co.* v. *McClain*, 105 Fed. 367, 371 (C. C. E. D. Pa.), aff'd, 108 Fed. 618 (C. C. A. 3d); *Park* v. *Gilligan*, 293 Fed. 129, 132 (S. D. Ohio); *Boston & P. R. Corp.* v. *Gill*, 257 Fed. 221 (D. Mass.).

[10] See also *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 306; *United States* v. *Rogers*, 255 U. S. 163, 169;

Interest, as an element of full restitution, is not given, in the absence of statutory authority or contractual undertaking, where suit is brought against the United States. *Smyth* v. *United States,* 302 U. S. 329, 353, and cases cited. This exception to the general principle, however, is based primarily upon the immunity of the United States to suit (see *infra,* pp. 17–18) and reaches no farther than its foundation. The variety of cases in which the exception is narrowly applied reinforces the rule that interest should generally be paid in order to make full restitution. Thus, in suits against the collector, the Government's lack of privity is nominal only.[11] Yet this Court has recognized that interest may be allowed in a suit against him for money collected as taxes and wrongfully withheld. *Billings* v. *United States,* 232 U. S. 261, 284–288; *Redfield* v. *Bartels,* 139 U. S. 694; *Erskine* v. *Van Arsdale,* 15 Wall, 75, 77.[12]

Phelps v. *United States,* 274 U. S. 341, 344; cf. *Shoshone Tribe* v. *United States,* 299 U. S. 477, 496; *United States* v. *Klamath Indians,* 304 U. S. 119, 123.

[11] No action for trespass can be brought against the collector after he has paid the taxes into the Treasury pursuant to his statutory duty, and whatever remedy the taxpayer may have is solely the creation of the statute. *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693; *Auffmordt* v. *Hedden,* 137 U. S. 310, 329. Where the collector has performed a ministerial duty, commanded by his superior, he is entitled as of right to a certificate preventing the issuance of execution upon the judgment, which is paid out of the Treasury. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380–381.

[12] See cases cited in note 9, *supra.*

The rule that the United States is not liable for interest in the absence of statute or express agreement has been severely restricted in other situations. It has not been applied in suits against subordinate agencies of the Federal Government;[13] in admiralty cases where a cross-libel is filed against the United States;[14] in claims for violation of the law of prize;[15] in suits on war-risk insurance policies issued by the United States;[16] in claims against the Alien Property Custodian;[17] and the Director of Railroads.[18] Indeed, the more recent decisions of this Court evidence some tendency to give interest against the United States in situations where formerly it was denied. Compare *United States* v. *North American Co.*, 253 U. S. 330, with *Jacobs* v. *United States*, 290 U. S. 13, 18; and *Angarica* v. *Bayard*, 127 U. S. 251, with *Henkels* v. *Sutherland*, 271 U. S. 298, 301–302.

The principle of all these decisions is that full restitution requires the payment of interest on property or money wrongfully detained. Even in the case of unliquidated damages, when necessary

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[13] *National Home* v. *Parrish*, 229 U. S. 494, 496.

[14] *United States* v. *Thelka*, 266 U. S. 328, 341; *Naamlooze Vennootschap, etc.* v. *Moran Towing & Transp. Co.*, 11 F. (2d) 377 (S. D. N. Y.).

[15] *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paqueta Habana*, 189 U. S. 453.

[16] *Standard Oil Co.* v. *United States*, 267 U. S. 243, 257.

[17] *Miller* v. *Robertson*, 266 U. S. 243, 257.

[18] *Standard Oil Co.* v. *Payne*, 220 Mich. 663, certiorari denied, 263 U. S. 699.

in order to arrive at fair compensation, the federal courts in the exercise of a sound discretion include interest or its equivalent as an element of damages. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 554. Neither statute nor express agreement need be found to allow interest where full restitution requires it. *Young* v. *Godbe*, 15 Wall. 562, 565; *Billings* v. *United States*, 232 U. S. 261, 284–288.[19]

4. It is immaterial that interest does not usually run against the Government

The doctrine that interest does not run against the Government in the absence of statute or contract evincing a contrary intention[20] has no application to the present situation.

The cases show the rule to be based upon an interpretation of the intention of Congress. *United States* v. *Ferraira*, 13 How. 40; *Gordon* v. *United States*, 7 Wall. 188; *United States ex rel. Angarica*

[19] In controversies between nations interest is usually payable upon money unlawfully detained. 6 Moore, Digest of International Law (1906) pp. 1028–1029; Ralston, Law and Procedure of International Tribunals (1926) Secs. 210–212; Eagleton, Measure of Damages in International Law (1929) 39 Yale L. J. 52, 75; *The Nuestra Senora de Regla*, 108 U. S. 92, 104; Vergil's Award, 4 Moore, International Arbitrations (1898) p. 4390; *Russia* v. *Turkey*, Scott, Hague Court Reports (1916) pp. 297, 309 *et seq.*

[20] *Smyth* v. *United States*, 302 U. S. 329, 353; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American T. & T. Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251.

v. *Bayard*, 127 U. S. 251.[21] Since the Executive Departments early adopted the practice of refusing interest in the absence of express authorization,[22] the failure to provide for interest would indicate, in the absence of other factors, the intention of Congress not to allow it. That the congressional intent, read in the light of the sovereign immunity, is the basis for the rule is indicated by the cases which allow interest against the United States wherever the circumstances reasonably indicate that its allowance would meet the approval of the Congress. *United States* v. *McKee*, 91 U. S. 442, 451; *United States* v. *Blackfeather*, 155 U. S. 180, 192; *Standard Oil Co.* v. *United States*, 267 U. S. 76.[23] It is likewise shown by the cases (*supra*, pp. 15–16) allowing interest where the Government, though not the formal defendant, is the real party in interest.

The practical reasons of government for refusing the allowance of interest against the United States in the absence of express Congressional

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[21] The consent of the United States to be sued is a privilege that may be withdrawn or qualified at any time. *De Groot* v. *United States*, 5 Wall. 419, 432; *Schillinger* v. *United States*, 155 U. S. 163, 166, 168; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234. The right of a claimant to recover interest from the Treasury, accordingly, depends upon the breadth of the privilege granted by Congress.

[22] See *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; 1 Op. A. G. 268, 550, 554; 3 *id.* 635; 4 *id.* 14, 136, 286; 5 *id.* 105; 7 *id.* 523; 9 *id.* 57, 449.

[23] Cf. *United States* v. *New York*, 160 U. S. 598, 619–624; *United States* v. *Old Settlers*, 148 U. S. 427, 478.

consent have little bearing upon the scope of the right granted to the allottee here. The tax exemption was promised by treaty and conferred by patent in pursuance of a plan to encourage the Indians in achieving economic independence and adopting the habits of civilized life.[24] Freedom from the burden of local government maintenance was a reasonable and necessary part of this general scheme. There is no basis for assuming that the United States was concerned with restricting the restitution recoverable from local government units that encroached upon the exemption and enforced contribution from Indian wards in violation of express Congressional policy. On the contrary, the property conferred upon its wards in furtherance of the Congressional plan could be adequately protected from encroachments by local, and frequently hostile,[25] communities only by permitting full restitution. From the standpoint of the Indian ward, full restitution would clearly be implicit in the exemption under the liberal rule of construction established by the decisions of this Court.

The decision in *United States* v. *North Carolina*, 136 U. S. 211, relied upon by the petitioner (Br. 10), does not aid its case. There the United States sought to recover, on state bonds payable to a state railroad company or bearer, interest from the date

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[24] See *United States* v. *Rickert*, 188 U. S. 432, 437; *United States* v. *Pelican*, 232 U. S. 442, 450-451.

[25] See *United States* v. *Kagama*, 118 U. S. 375, 384.

of maturity to the date of payment. This Court, denying recovery, pointed out that the laws of the state under which the bonds were issued required their redemption at the end of 30 years, that the bonds by their terms bore interest only until maturity, and that the state officers had no authority to stipulate for interest for any subsequent period. The statutes of North Carolina were, of course, a part of the contract upon which the United States based its claim. In buying North Carolina bonds the United States as assignee acquired only the rights of its assignor. *Guaranty Trust Co.* v. *United States,* 304 U. S. 126. See also *United States* v. *Nashville C. & St. L. Ry. Co.,* 118 U. S. 120, 125. Hence, like any other holder of North Carolina bonds, it was bound by the provisions under which the paper was issued and accepted. Cf. *South Dakota* v. *North Carolina,* 192 U. S. 286, 321; *United States* v. *Barker,* 12 Wheat. 559. The North Carolina law did not conflict with any federal statute or constitutional provision, and was therefore applicable. Cf. *United States* v. *Belmont,* 301 U. S. 324, 331–332; *Mason* v. *United States,* 260 U. S. 545; *Wooden-Ware Company* v. *United States;* 106 U. S. 432, 436.

The United States, in allotting lands to the Pottawatomie Indians, clearly did not consent to be bound by any state statute or decision which would deprive the Indians of vested federal rights. Compare *United States* v. *Guaranty Trust Co.,* 293

U. S. 340, 346. Neither expressly nor impliedly has the United States waived the right of the allottee to obtain complete recovery for all damages resulting from such interference. The allowance of interest as compensation for depriving the allottee of the use of her money is implicit in the "due recognition" of the exemption promised by treaty and confirmed by act of Congress. *Ward* v. *Love County*, 253 U. S. 17, 22.

5. This Court has allowed interest in similar cases

In at least two cases this Court has affirmed or reinstated judgments requiring a county to pay interest on taxes wrongfully collected from Indian allottees.[26]

Ward v. *Love County*, 253 U. S. 17, was concerned with the suit of sixty-seven restricted Indians for the return, with interest, of taxes wrongfully collected by Love County, Oklahoma. When the County refused to plead further after its demurrer was overruled, the trial court entered a judgment for the plaintiffs for $10,164.24, of which $2,340.89 represented interest on the taxes from the date of payment to the date of judgment. The judgment of the Supreme Court of Oklahoma (68 Okla. 278), reversing the trial court, was in turn

[26] Interest is not recoverable under later decisions of the highest court of the State in which the cases arose. *Eaton* v. *St. Louis-Santa Fe Ry. Co.*, 122 Okla. 143; *Brown* v. *Board of Education*, 148 Okla. 97; *Board of County Comm'rs* v. *City of Marlow*, 148 Okla. 126.

reversed by this Court in an opinion holding that "money got through imposition" may be recovered back, and that restitution or compensation would be compelled, independent of any statute, where a county obtains money without authority. This Court fully understood that interest was included because the opinion declares (p. 20) that the total claim was "$7,823.35, aside from interest."

In *McCurdy* v. *United States*, 264 U. S. 484, the United States brought suit against the treasurer of Osage County, Oklahoma, to enjoin the collection of certain state taxes and to recover taxes already paid by Indian allottees "together with interest at the rate of six percent per annum from the date of the unlawful collection of such moneys until the date the same shall be refunded" (Record, *McCurdy* v. *United States*, No. —, Oct. Term, 1922, p. 10). The judgment of the federal District Court dismissing the Government's bill was reversed by the Circuit Court of Appeals "with instructions to grant the relief prayed for." *United States* v. *McCurdy*, 280 Fed. 103, 105 (C. C. A. 8th). The decision of the Circuit Court of Appeals was in turn affirmed by this Court, *sub nom. McCurdy* v. *United States*, 264 U. S. 484.

While the question of interest was not discussed in either of the foregoing cases, the decisions are entitled to consideration, for it was in partial reliance on similar precedents that this Court allowed interest in *Billings* v. *United States*, 232 U. S. 261, 284–285.

6. No special circumstances restrict the right

Contrary to the contention made by the petitioner, neither the Government nor the allottee is estopped, by virtue of facts existent here, to claim interest on taxes paid involuntarily by the incompetent allottee. The unauthorized issuance of a fee simple patent did not bind the Government; much less could it deprive the incompetent Indian of vested rights. *Cramer* v. *United States*, 261 U. S. 219, 234, and cases cited. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. The allottee's conduct has not been inequitable. Through no fault of hers and over her objection, she was deprived of her tax exemption for the years 1919–1933. The position of this allottee as an incompetent ward of the Government clearly precludes any finding of misconduct on her part.[27] She has an exemption binding on the United States as well as the State of Kansas and its political subdivisions. *Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17.

The finding of the jury that the taxes were paid involuntarily (R. 41–42) establishes the right of the allottee to interest for the entire period elapsed between the time of payment and the date of the judgment. The amount improperly collected was a liquidated sum which the county admittedly had

[27] See *United States* v. *Minnesota*, 270 U. S. 181, 196; *Board of Comm'rs of Caddo County, Okla.* v. *United States*, 87 F. (2d) 55, 57 (C. C. A. 10th); *United States* v. *Benewah County*, 290 Fed. 628 (C. C. A. 9th).

no right to retain. No formal protest was necessary to recover the principal with interest from the date of payment. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 147; cf. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 528; *Board of Commissioners of Jackson County* v. *Kaul*, 77 Kan. 715, 719 (1908).[28] The finding that the payment was made involuntarily negatives any assumption that the payment was mistakenly made. Where taxes are paid without mistake and under compulsion, interest should be allowed from the date of payment. Those cases disallowing interest for the period prior to demand or commencement of suit are based on findings of inequity or laches not applicable to the allottee in this proceeding. See *Redfield* v. *Bartels*, 239 U. S. 694, 702; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *United States* v. *Skinner & Eddy Corp.*, 28 F. (2d) 373 (W. D. Wash.), modified, 35 F. (2d) 889 (C. C. A. 9th).[29]

Where the claim is not inequitable interest is recoverable as a matter of course. *Lincoln* v. *Claflin*, 7 Wall. 132, 189; *Spalding* v. *Mason*, 161 U. S. 375,

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[28] Cf. *Boston & Sandwich Glass Co.* v. *City of Boston*, 4 Metc. (Mass.) 181 (1843); *Metropolitan Life Ins. Co.* v. State, 194 Ind. 657 (1924); *Chicago, St. P. M. & O. Ry. Co.* v. *Mundt*, 56 S. D. 530 (1930); *County of Galveston* v. *Galveston Gas Co.*, 72 Tex. 509 (1889); *State Tax Comm.* v. *United Verde E. Min. Co.*, 39 Ariz. 136 (1931).

[29] The record does not show when demand was first made for the return of the money wrongfully collected. Specific demand was made in the complaint, filed on December 23, 1936 (R. 1–5). The petitioner can rely on no excuse whatever for wrongfully retaining the money after that date.

396; *Miller* v. *Robertson*, 266 U. S. 243, 259. Even in cases where some element of discretion enters into the allowance of interest, the court may nevertheless direct the jury in a clear case to include interest in the verdict. *Jones* v. *United States*, 258 U. S. 40, 49. Thus it appears that the decision in the instant case should not turn upon any circumstance peculiar to this allottee but should be determined simply by the scope of the right to tax exemption granted to the Pottawatomies.

The inclusion within the scope of the exemption of interest on taxes wrongfully collected requires merely the application of sound and established rules of construction. It is manifest that without interest the allottee will not be restored to the position she would have occupied had her exemption been respected. The refusal of interest would amount in effect to the recognition of a right on the part of a county to make a forced requisition of the use value of the property of the Pottawatomies. It would thus be, in effect, a disguised tax. See *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.); *Nutt* v. *Ellerbe*, 56 F. (2d) 1058 (E. D. S. C.); *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386n. Due regard for the defenseless position of these Indian wards of the nation clearly militates against such a restricted interpretation of their rights. The liberal rules of construction properly invoked by the allottee

impel a holding that interest is a necessary part of full restitution implicit in the right to tax exemption granted by federal statutes and treaties.

II

THE FEDERAL RIGHT TO INTEREST IS NOT DEFEATED BY STATE LAW

1. THE KANSAS LAW IS NOT IN CONFLICT.

There is no statute in Kansas which forbids the allowance of interest against a county and the decisions of the Supreme Court of Kansas have not determined whether interest may be recovered against a county by a restricted Indian allottee. An analysis of the cases cited by the petitioner discloses that the question is still open.

In *Jackson County* v. *Kaul*, 77 Kan. 715, 718, a private taxpayer, from whom taxes had been collected wrongfully, sought to recover interest under a general statute not expressly applicable to the county. The Kansas Supreme Court first declared (pp. 718–719) that the county, having collected the taxes under compulsion, had no right to retain the money for a single day and owed a duty to make restitution at once. It then held the statute inapplicable under the settled rule that a general statute does not bind the sovereign in the absence of express provision. This case has been followed without discussion in later decisions.[20]

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[20] *Hupe* v. *Sommer*, 88 Kan. 561, 567 (1913); *Salthouse* v. *McPherson County*, 115 Kan. 668, 673 (1924); *School District* v. *Kingman County Comm'rs*, 127 Kan. 292 (1929).

But it has never been applied to a proceeding brought to enforce tax exemptions conferred by Congress on its Indian wards. The favored position of the Indians, dependent upon the protection and good faith of the Government, has frequently been recognized by Kansas decisions. See *McGannon* v. *Straightlege*, 32 Kan. 524, 525 (1884); *Brown* v. *Steele*, 23 Kan. 672 (1880); *Maynes* v. *Veale*, 20 Kan. 374, 389 (1878); *Parker* v. *Winsor*, 5 Kan. 362, 367, 375 (1870). It cannot be assumed that an Indian allottee suing in Kansas to enforce rights granted by the United States would necessarily be denied interest for the wrongful detention of his money.

The decision in the *Kaul* case appears to rest upon lack of statutory authority and not upon any clear public policy forbidding the allowance of interest against a county. Thus, in *First National Bank* v. *Wabaunsee County Comm'rs*, 145 Kan. 552, interest was allowed in a suit on two ~~tax~~ warrants although no express provision was made in the ~~warrants~~ for the payment of interest. The court distinguished the *Kaul* decision and spelled out an implied agreement to pay interest for the delay in paying the money due. Similarly, interest against the county is recoverable in eminent domain proceedings. *Flemming* v. *Ellsworth County Comm'rs*, 119 Kan. 598. In view of the established federal doctrine that the wrongful detention of taxes does not differ in principle from the wrongful detention

of other money or property,[31] the *Kaul* case should not be given an extended interpretation in the federal courts.

Moreover, the rule that interest does not ordinarily run against the sovereign has been considerably restricted in the federal courts since the *Kaul* case was decided. In *National Home* v. *Parrish*, 229 U. S. 494, 496, this Court pointed out that "this exemption has never as yet been applied to subordinate governmental agencies." The federal courts have never regarded a county as having the sovereign attribute of immunity to suit, but have treated it as being in the same class with other corporate bodies. See *Marsh* v. *Fulton County*, 10 Wall. 676, 684; *Chapman* v. *County of Douglas*, 107 U. S. 348; *Chicot County* v. *Sherwood*, 148 U. S. 529; compare *Supervisors* v. *Rogers*, 7 Wall. 175; *Guardian Savings Co.* v. *Road District*, 267 U. S. 1.

Until the Kansas court has definitely spoken, the federal courts in the exercise of a sound discretion may apply established principles and include interest as an element of fair restitution. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 551; see *Jones* v. *United States*, 258 U. S. 40, 49.

B. THE KANSAS LAW, IF IN CONFLICT, MUST YIELD TO THE FEDERAL RULE

As shown in Part I (*supra*, pp. 7–26), the right to recover interest on taxes wrongfully detained is

[31] See cases cited *supra*, pp. 13–14.

implicit in the tax exemption granted by Congress. No decisions of the State of Kansas, if they be thought applicable to Indians as well as to other taxpayers, can encroach upon the federal right thus given to the Indians. Neither state statute, policy, nor court decision can curtail the right of the allottee asserted in a suit by the United States on behalf of its ward.

The decisions of this Court have established beyond controversy that in Indian matters the federal power is supreme and exclusive. *Worcester* v. *Georgia*, 6 Pet. 515; *United States* v. *Pelican*, 232 U. S. 442, 447. This is particularly true where, as here, federal supremacy rests not only upon the provisions of the Constitution but also upon the provisions of the statute setting forth the terms upon which Kansas was admitted to the Union.[32] Thus in *The Kansas Indians*, 5 Wall. 737, where Kansas attempted to deprive the Indians of their tax exemption, this Court said (p. 756):

> There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

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[32] Kansas Enabling Act of January 29, 1861, c. 20, 12 Stat. 126.

Various attempts to abridge rights which Congress has conferred on its Indian wards have been struck down by this Court even though the conflict with federal policy was indirect.

In *United States* v. *Rickert*, 188 U. S. 432, a statute of South Dakota classified "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. This Court enjoined the collection of taxes assessed by Roberts County upon improvements on restricted Indian allotments, and pointed out that the State classification, if upheld, would partially destroy the tax-exemption and defeat the policy of Congress embodied in the General Allotment Act. Similarly, an Oklahoma tax upon the owner of any royalty interest in petroleum and natural gas was held invalid as applied to Indian allottees despite the inisistence of the State that the tax was on the oil and gas severed from the realty. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368.

An analogous refusal to give effect to a state decision interfering with a federal right is illustrated by *Bunch* v. *Cole*, 263 U. S. 250. An Indian allottee there sued to recover for the wrongful occupancy and use of lands which he had leased to the defendants by instruments calling for a cash rental of $75.00 per annum. These leases were in excess of the powers of alienation permitted the Indian by Acts of Congress and, by the terms of those Acts, were "absolutely null and void." The Oklahoma Supreme Court admitted that the leases were void,

but so construed and applied a local statute that the leases were regarded as creating a tenancy at will and the compensation due the plaintiff was limited. This Court held that the statute, so construed and applied, was in conflict with Congressional restrictions on alienation, and therefore was invalid. Cf. *Monson* v. *Simonson*, 231 U. S. 341, 347; *Mullen* v. *Pickens*, 250 U. S. 590, 595.

Sage v. *Hampe*, 235 U. S. 99, furnishes an example of the extensive power of Congress to protect its Indian wards and of the principle, consistently recognized by the Court, that the necessities of the situation require construction of Acts of Congress so as to achieve that purpose. The case involved a contract between two white persons to convey land of Pottawatomie Indians to which the vendor could not acquire title until a restriction against alienation was removed. After the removal of the restriction the vendor failed to perform and the vendee sued for damages. The Kansas courts gave a judgment for the vendee even though the contract tended to bring improper influence to bear on the Secretary of the Interior to remove the restrictions. This Court held that the contract was opposed to the policy implicit in the General Allotment Act, and that even though Kansas upheld it, this Court would construe the Act as broad enough to interdict such an agreement. In reversing the judgment below, Mr. Justice Holmes declared (p. 106) "There can be no question that the United States can make its pro-

hibitions binding upon others than Indians to the extent necessary effectively to carry its policy out." In like manner, state provisions requiring prompt payment of taxes or their payment under formal protest, while expressing a legitimate state policy, are without effect in proceedings brought by the United States to enforce the federal rights of its Indian wards. *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232, 236 (C. C. A. 9th).

The cases in which this Court has protected the rights of the Indians from local encroachments are but particular examples of the general and necessary principle that a plain assertion of a federal right cannot be defeated by either substantive or procedural rules of state law. *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Ward* v. *Love County*, 253 U. S. 17, 22.

Examples from other fields where state public policy must bow to federal policy, even though the conflict is indirect, may be briefly mentioned.[33] In *Tullock* v. *Mulvane*, 184 U. S. 497, this Court refused to apply a Kansas doctrine including attorney's fees as part of the "costs" covered by a surety bond given in an injunction proceeding in a

[33] The policy implicit in the National Bank Act has been held determinative, despite contrary state doctrines, of the validity of pledges of assets made to secure deposits. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262; *Walter F. Downey, Receiver of First National Bank & Trust Co. of Yonkers* v. *City of Yonkers*, C. C. A. 2d, decided August 3, 1939, not yet reported.

federal court. The proper construction of the bond was a federal question, since a state decision could not operate to impair the right to relief in the federal courts. Cf. *Missouri Pacific Ry. Co.* v. *Larabee,* 234 U. S. 459, 468, 471–473. *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70, furnishes another close analogy. There costs were assessed against the state, notwithstanding the settled doctrine of the state that the sovereign pays no costs. This Court held that the state doctrine was in conflict with its own policy of allowing costs to the successful litigant and must consequently be rejected, and the Court declared (p. 74): "Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such."

Other decisions, too, clearly establish the power of the United States to maintain an action in the federal courts on behalf of its Indian wards without hindrance from conflicting doctrines of state law. The United States cannot be estopped by the acts or laches of its agents from enforcing either its own rights or those of its wards. *United States* v. *Minnesota,* 270 U. S. 181, 196; *Cramer* v. *United States,* 261 U. S. 219, 234. Nor is the United States limited to local remedies when others are needed to protect the Indians. *United States* v. *Osage County,* 251 U. S. 128, 133; see *Ward* v. *Love County,* 253 U. S. 17, 24.

There can be no reliance upon any immunity to suit in the instant case. The Eleventh Amend-

ment does not apply to a county which may be sued in the federal courts even in the absence of consent.[34] This Court has consistently held that immunity from suit cannot be permitted to defeat the declared policy of Congress in the administration and enforcement of statutes designed to protect its Indian wards. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 756. Even the state itself cannot establish its immunity in an action brought by the United States in its sovereign capacity to enforce a federal right. *United States* v. *Texas*, 143 U. S. 621; *United States* v. *Minnesota*, 270 U. S. 181.

CONCLUSION

The rule of construction consistently applied in the decisions of this Court clearly establishes the right of the allottee to a complete tax exemption. The allowance of interest here would conform to the settled policy of this Court, and the Federal Government of dealing liberally with the claims asserted on behalf of Indian wards. The denial of interest here would extend a local doctrine beyond the limits established by the state courts, so as to create a substantial conflict with general principles of fair restitution adopted by the federal courts. It would restrict the exemption which the Indians expected to receive and sanction the im-

[34] See *Hopkins* v. *Clemson College*, 221 U. S. 636, 645; *Chicot County* v. *Sherwood*, 148 U. S. 529; *Lincoln County* v. *Luning*, 133 U. S. 529, 530; *Commissioners* v. *Sellew*, 99 U. S. 624; *Cowles* v. *Mercer County*, 7 Wall. 118.

position of a disguised tax on the lands of the allottee. The right to interest must, therefore, be considered a federal right implicit in the right to tax exemption.

The judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1939.

APPENDIX

Articles II and III of the Treaty of November 15, 1861, 12 Stat. 1191:

ARTICLE II. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and headmen respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each headman, one half section; to each other head of a family, one quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use

and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE III. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States;

and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided,* That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

Section 5 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388 (25 U. S. C. sec. 348):

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. * * *

Act of May 8, 1906, c. 2348, 34 Stat. 182 (25 U. S. C. sec. 349):

> * * * At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *.

Act of February 26, 1927, c. 215, 44 Stat. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. 1205 (25 U. S. C. sec. 352a-b):

> * * * The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided,* That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also,* That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1939.

The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner,
vs.
United States of America, etc.

On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[December 18, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review an affirmance by the Circuit Court of Appeals for the Tenth Circuit of a ruling by the District Court for the District of Kansas allowing interest in a suit for the recovery of taxes by the United States on behalf of an Indian under circumstances presently to be stated. 100 F. (2d) 929. We granted *certiorari* because of conflicting views between the Ninth and the Tenth Circuits. See *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232.[1]

M-Ko-Quah-Wah is a full-blooded Pottawatomie Indian. In her behalf the United States asserts whatever rights she may have flowing from the Treaty of November 15, 1861, between the United States and the Pottawatomie nation of Indians, 12 Stat. 1191, and the legislation in aid of it. This Treaty made lands held by the United States in trust for the Pottawatomie Indians "exempt from levy, taxation, or sale . . .", "until otherwise provided by law. . . ." The land which gave rise to this controversy, situated in Jackson County, Kansas, was patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. Two ten-year extensions were made by Executive Order, one, in 1918 and the other, in 1928; and by the Act of June 18, 1934, the existing trust periods were indefinitely extended by Congress. 48 Stat. 984.

[1] This case has since been followed by the same court in United States v. Lewis County, Idaho, 91 F. (2d) 236 and Glacier County, Mont. v. United States, 99 F. (2d) 733.

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In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding trust patent and in its place issued a fee simple patent. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its regular property taxes. It continued to do so as long as this fee simple patent was left undisturbed by the United States. In 1927 Congress authorized the Secretary of the Interior to cancel fee simple patents theretofore issued over the objection of allottees. In 1935 the patent for the land in controversy was cancelled, and in the next year proceedings were begun by the United States as guardian of M-Ko-Quah-Wah to recover the taxes which Jackson County had collected, amounting to $1,966.13, with interest from the respective dates of payment. The District Court allowed interest at 6%, and a verdict for principal and interest, amounting to $3,277.49, was returned by the jury. A judgment upon this verdict was affirmed by the Circuit Court of Appeals. Jackson County does not here contest its liability for the principal, but challenges the Government's right to interest prior to judgment.

The issue is uncontrolled by any formal expression of the will of Congress. The United States urges that we must be indifferent to the law of the state pertaining to the recovery of taxes improperly levied on land within it. Jackson County, on the other hand, urges that the law of Kansas controls. It is settled doctrine there that a tax-payer may not recover from a county interest upon taxes wrongfully collected. *Jackson County* v. *Kaul*, 77 Kan. 715.

We deem neither the juristic theory urged by the Government nor that of Jackson County entirely appropriate for the solution of our problem. The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within Congressional control. But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption. It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas. *Cf. Erie R. Co.* v. *Tompkins*, 304 U. S. 64. And so the concrete problem is to determine the materials out

of which the judicial rule regarding interest as an incident to the main remedy should be formulated. In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from a federal law, thus implying a wish of Congress to collect what it deemed fairly owing according to the traditional notions of Anglo-American law, this Court has chosen that rule as to interest which comports best with general notions of equity. *United States* v. *Sanborn*, 135 U. S. 271, 281; *Billings* v. *United States*, 232 U. S. 261. Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.

But the present case introduces an important factor not present in former decisions. The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory.

Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skilful its legal manipulations. *United States* v. *Rickert*, 188 U. S. 432. *Cf. Bunch* v. *Cole*, 263 U. S. 250. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. *United States* v. *Osage County*, 251 U. S. 128; *Ward* v. *Love County*, 253 U. S. 17. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law. *Carpenter* v. *Shaw*, 280 U. S. 363. Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. *United States* v. *Minnesota*, 270 U. S. 181. *Cf. Ches. and Del. Canal Co.* v. *United States*, 250 U. S. 123. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.

But the recovery of interest in inter-governmental litigation has no such roots in history. Indeed, liability for interest is of relatively recent origin and the rationale of its recognition or denial is not always clear. That it is not a congenital rule in our law is indicated by its denial in *United States* v. *North Carolina*, 136 U. S. 211, on grounds of "public convenience". Since Congress

has, in the legislation implementing the Indians' tax immunity, remained silent as to recovery of interest, we need not presume that it has impliedly fixed liability for interest in a suit like the present.

Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone* v. *White*, 301 U. S. 532, 534, Congress has left us free to take into account appropriate considerations of "public convenience". Cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. See, e. g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown* v. *United States*, 263 U. S. 78; *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate.

Assuming, however, that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States* v. *Sanborn*, 135 U. S. 271, 281; *Billings* v. *United States*, 232 U. S. 261.

Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation

was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

Such is this Court's doctrine regarding the imposition of interest in cases where this Court has fashioned its own doctrine. If it be said that the default of the United States should not be charged against its Indian wards, a choice has to be made between equally innocent victims of official neglect from 1918 until 1936 in the administration of the Indian law. The loss of interest to the United States because of the conduct of its officials in the *Sanborn* and *Billings* cases, *supra*, had to be borne by the innocent public. We think as to interest here, the loss should remain where it has fallen. If thereby Indians are out of pocket, they should not be made whole by putting Jackson County unfairly out of pocket. The appeal for relief must be made elsewhere.

The judgment below must accordingly be modified, and the case is remanded for further proceedings in accordance with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1939.

The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner,
vs.
United States of America, etc.

On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[December 18, 1939.]

Opinion of Mr. Justice Black.

Congress has traditionally treated the Indian wards of the Nation with particular solicitude,[1] but has also gradually evolved a policy looking to their eventual absorption into the general body of citizenry.[2] This policy has progressively subjected Indians to the laws under which all other citizens must live in the Indians' States of residence, if not in conflict with specific protective measures of Congress.[3] Here, in the exercise of its plenary authority, Congress by treaty exempted the lands of the Pottawatomies from taxation. It could have by stipulation granted the additional right to recover interest on any taxes collected in violation of the exemption; but it did not. The failure of Congress to stipulate that a State—as here—must pay interest to an Indian when the State law permits interest to no one,[4] is entirely consistent with the congressional policy of steadily extending the operation of the States' laws over their resident Indians. Congress—with exclusive plenary power to legislate concerning the Indians—has not provided for recovery of interest from Kansas, and the courts have no constitutional power to create the right.

[1] Lone Wolf *v.* Hitchcock, 187 U. S. 553, 564-6, 568; United States *v.* Pelican, 232 U. S. 442, 450.

[2] Chippewa Indians *v.* United States, 307 U. S. 1, 4; see Stuart *v.* United States, 18 Wall. 84, 87; Matter of Heff, 197 U. S. 488, 497-503; Lane *v.* Mickadiet, 241 U. S. 201, 210; Dickson *v.* Luck Land Co., 242 U. S. 371, 375; McCurdy *v.* United States, 246 U. S. 263, 269.

[3] See Matter of Heff, *supra;* La Motte *v.* United States, 254 U. S. 570, 579, 580; Spery Oil Co. *v.* Chisolm, 264 U. S. 488, 498; Larkin *v.* Paugh, 276 U. S. 431, 438-9; United States *v.* McGowan, 302 U. S. 535, 539.

[4] Jackson County *v.* Kaul, 77 Kan. 717.

That Congress contented itself with the creation of the right to be free from taxation—as distinguished from a right to interest in a suit for refund—is emphasized by the conclusion which would be inescapable were this a suit against the United States for violation of the exemption here conceded to be binding on it.[5] Without more,[6] Congress would then—even on the basis of this concession—be deemed to have refused to create the separate right to recover interest.[7]

Because the laws of Kansas deny interest on tax refunds, I concur in the modification of the judgment below.[8]

Mr. Justice DOUGLAS concurs in this opinion.

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[5] The Government bases its concession on Choate v. Trapp, 224 U. S. 665. But see The Cherokee Tobacco, 11 Wall. 616; Ward v. Race Horse, 163 U. S. 504, 511; Lone Wolf v. Hitchcock, *supra*, 566.

[6] Cf. 26 U. S. C. 1671(a).

[7] Angarica v. Bayard, 127 U. S. 251, 260; United States v. No. Amer. Co., 253 U. S. 330, 336; Smythe v. United States, 302 U. S. 329, 353. Cf. United States v. North Carolina, 136 U. S. 211.

[8] Cf. Erie R. Co. v. Tompkins, 304 U. S. 64.